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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. STEVEN PATRICK RYAN, Defendant and Appellant.	A154832 (Mendocino County Super. Ct. No. SCUK-CRCR-16-88246)

Defendant Steven Patrick Ryan was convicted of voluntary manslaughter and sentenced to 21 years in prison. On appeal he contends the court denied him a fair trial by instructing the jury regarding inapplicable limitations on a defendant's right to self-defense (CALCRIM Nos. 3171 and 3172). Defendant also contends that the trial court abused its discretion by imposing the aggravated terms for both the offense and a firearm enhancement, and that the case must be remanded to permit the trial court to exercise its discretion to consider pretrial mental health diversion under Penal Code[1] section 1001.36. We find no prejudicial error in defendant's conviction or sentence and no basis for remand. Defendant is not eligible for pretrial mental health diversion under section 1001.36, subdivision (b)(2). We shall therefore affirm the judgment.

Background

On November 21, 2016, defendant shot and killed De'Shaun Davis. Defendant was charged with a single count of murder (§ 187, subd. (a)). The information further

[1] All statutory references are to the Penal Code unless otherwise noted.

alleged that defendant personally used and discharged a firearm causing death. (§ 12022.53, subd. (d).)

At trial, defendant's friend and former neighbor testified that about 11:00 a.m. on November 21, 2016, as she was approaching her parents' home next to defendant's home, she saw defendant standing in the grassy area in front of his porch. He held a coffee cup in one hand and was gesturing with his other hand. She then saw a young African-American man, later determined to be De'Shaun Davis, walking and pushing a bicycle near dumpsters 175 feet from defendant's porch. Davis appeared to be leaving the property. After she parked her car and turned off the engine and radio, she heard defendant telling the young man in a very loud voice, "Get out of the property. This is private property."[2] Defendant's tone was loud and angry. When she stepped out of the car, she heard Davis say, "I am not doing anything. I am just passing by." Davis said it more than once because defendant kept telling him to get out of the property. Defendant turned to her and said, "You might want to get in the house."

As she was removing her children from the car, defendant twice repeated his demand that Davis leave the property, and Davis repeated that he was not doing anything and was just passing by. Defendant walked back to the porch and set his cup down. Davis appeared to become frustrated. He threw down his bicycle and started walking towards defendant. Davis gestured with his hands and said, "I am not doing anything." Defendant said, "Get out of my yard." Davis replied, "I am not in your yard. I am just passing by. I am not doing anything." He continued walking towards defendant and said, "You need to get a wheelchair, you old man." Davis also said he was 27 years old, he had been in the Navy or the Marines, and he could do whatever he wanted. Defendant said, "You need to get out of here. You need to get out of my yard." Davis said, "I am not in your yard. I am not."

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[2] Witnesses testified that defendant's home is among seven homes accessed by an approximately half-mile dirt road that begins near an intersection with a number of commercial buildings. The homes are surrounded by a vineyard and City of Ukiah ball fields. It is undisputed that the dumpsters are not located on defendant's property.

As Davis was approaching, defendant pulled a handgun from behind his back and pointed it at Davis, holding it with both hands. Davis raised his hands, and defendant shot once at Davis. Davis dropped to his knees, with his hands still up, and said, "No, no, no. I give up. Stop." After which, defendant shot him two more times. Davis fell to the ground and did not move again. After the shooting, defendant told her, "I might need you as a witness," and "You might want to call the police."

According to the witness, Davis never stepped into defendant's yard and she did not hear any cursing. She saw everything, and her view of defendant and Davis was unobstructed. Davis had not reached for anything; his hands did not come down once they were up and he was on his knees. She could see no reason for the shooting.

When the police arrived, they found Davis's body in front of defendant's property. An autopsy found that two of the three bullets defendant fired from his .45-caliber handgun hit Davis. A criminalist testified that Davis was killed by a gunshot that entered his upper left shoulder, just above the armpit, travelled downward and lodged in the lower right rib cage. Metal rods inserted in the wound showed the bullet had entered at a downward angle, which supported the witness's testimony that Davis was on his knees when he was shot. Davis also had a gunshot wound on the back of his right hand.

Officers searched Davis's body and the area around his body and did not find any weapons. Other than clothing, the only items on or near his body were his wallet and a salt shaker. Police measurements showed that Davis's bicycle was 94 feet from the porch, and Davis's body was 65 feet from the porch.

Defendant testified that he was 62 years old at the time of the shooting. He had mobility issues, chronic back and leg pain, and a pain pump implanted in his body to administer morphine. Defendant had received firearm training when he was in the military and had received additional concealed-carry firearm training in Florida and in Connecticut.

According to defendant, on the morning of the shooting he was sitting on his back porch when he heard a man, later determined to be Davis, yelling from "very far away," but coming closer. Davis was yelling something like "mother fuck." Defendant went into

his house and retrieved his handgun. He went to his front porch and stood there for a "couple of minutes" just "waiting . . . to see what was coming [his] way." He did not call law enforcement to report the yelling. The yelling had stopped, but a dog started barking in the direction of his neighbor Alex's house. Defendant saw Davis on a bicycle looking over the fence. Defendant said, "Sir, can I help you?" Davis responded, "Shut the fuck up." Defendant tried to say something else, but Davis yelled over him. Davis then approached defendant "in kind of an angular way," sometimes on his bike, sometimes walking. Davis was still yelling. He said his girlfriend had broken up with him and that he did not care what happened that day. Davis would talk for a bit, then he would scream "shut the fuck up" at defendant. He was moving gradually towards defendant. Davis said he would use his hands and his feet to attack and kill defendant, and that defendant would not be able to do anything because he was an old man and would put defendant in his wheelchair.

When his neighbor's daughter arrived, defendant was on the grass in his front yard, near the front porch, with a cup of coffee in his hand. He tried to wave her away, but she parked and got out of her car. After she arrived, Davis threw his bicycle down and walked aggressively towards defendant. Defendant put his hand up and said, "Sir, if you attack me, I will defend myself." Davis asked defendant whether he had a gun. When defendant said that he did, Davis said, "I have a gun, too. Let's do this," and walked aggressively towards defendant. Davis also said he was a 32-year-old ex-Marine and could do whatever he wanted.

When Davis got near the property line, defendant testified, he reached down to his belt. That is when defendant pulled out his handgun and "very quickly" fired two rounds at Davis. Davis spun a little and fell to the ground. Davis fell slowly, but he slapped his hands by his waistline and rose up quickly. Defendant considered that to be an aggressive movement, and he fired a third shot at Davis. Defendant fired the third shot "multiple seconds" after firing the first two shots. Davis fell to the ground again, rolled from his back to his stomach, and said, "I am through." Defendant said, "Yes, sir."

Defendant secured his handgun, spoke with the witness, went inside his house, called 911, and waited for the police to arrive. He did not check on Davis after shooting him because he did not think it was safe to do so and it was "not his job." Defendant denied that Davis was on his knees when he was shot or that Davis had put his hands up or said that he was giving up. He testified that Davis's body was not found near his property line because he had crawled away after defendant shot him. When the police arrived defendant told them that he did not want Davis on his property, "[s]o when he hit my property line, I shot him."

The jury found defendant guilty of the lesser included offense of voluntary manslaughter in violation of section 192, subdivision (a), and found that he had personally used a firearm within the meaning of section 12022.5, subdivision (a), a lesser enhancement than alleged in the information. The court sentenced defendant to the upper term of 11 years for the voluntary manslaughter plus a consecutive upper term of 10 years for the firearm enhancement.[3]

Defendant timely filed a notice of appeal.

Discussion

1. CALCRIM Nos. 3471 and 3472

The court instructed the jury, pursuant to CALCRIM No. 505, that defendant is not guilty of murder or voluntary manslaughter "if he was justified in killing someone in self-defense." The jury was instructed, pursuant to CALCRIM No. 571, that "[a] killing that would otherwise be murder is reduced to voluntary manslaughter if the defendant killed a person because he acted in imperfect self-defense. [¶] If you conclude the defendant acted in complete self-defense, his action was lawful and you must find him not guilty of any crime. The difference between complete self-defense and imperfect self-defense depends on whether the defendant's belief in the need to use deadly force was

[3] Section 12022.5, subdivision (a) provides in relevant part that "any person who personally uses a firearm in the commission of a felony or attempted felony shall be punished by an additional and consecutive term of imprisonment in the state prison for 3, 4, or 10 years."

reasonable." The jury was further instructed regarding circumstances when self-defense is available to a "defendant who starts a fight" (CALCRIM No. 3471), and that a plea of self-defense may not be contrived (CALCRIM No. 3472).[4]

During closing argument, the prosecutor argued that the critical question was whether the jury believed the eyewitness who testified Davis was on his knees, begging defendant to stop before the fatal shot was fired, or whether the jury believed defendant's testimony that he fired each shot because he thought Davis was continuing to come towards him. The prosecutor argued, "you really don't have to get into the niceties of self-defense if you decide that [the eyewitness] is telling the truth, because there is no way that the laws of the United States of America in the State of California, give you the legal justification or just -- or excuse for shooting someone on their knees, hands up saying, 'No. No. I give up. Stop.' There is no law, I am telling you, on the books that allow for that. That's normally called murder." Relying on CALCRIM Nos. 3471 and 3472, the prosecutor argued that defendant had no claim to self-defense because defendant started the fight with Davis, never gave up or advised Davis that he did not "want to fight anymore," and did not disengage. Turning to imperfect self-defense, the prosecutor argued, "[W]e have been talking about complete self-defense. Meaning, you know, you did everything right. The guy is charging on you. He's got a weapon, maybe he doesn't. He's going to do you great bodily harm. You would have to defend yourself. Complete self-defense says you're entitled to an acquittal. But there is a thing known as incomplete self-defense. And that's when you actually believe — you actually believe

[4] Without objection, the court instructed the jury pursuant to CALCRIM No. 3471 as follows: "A defendant who starts a fight has a right to self-defense only if: [¶] 1. He actually and in good faith tried to stop fighting; AND [¶] 2. He indicated, by word or conduct, to his opponent, in a way that a reasonable person would understand, that he wanted to stop fighting and that he had stopped fighting; AND [¶] 3. He gave his opponent a chance to stop fighting. [¶] If the defendant meets these requirements, he may have a right to self-defense if the opponent continued to fight." Also without objection, the court instructed the jury pursuant to CALCRIM No. 3472 as follows: "A person does not have the right to self-defense if he or she provokes a fight or quarrel with the intent to create an excuse to use force."

that the immediate use of force is needed, and you actually believe it was necessary. Okay. [¶] So if one of those is not real, that you believed it, but everybody else is oh, no, that's — you were wrong, well that might be incomplete self-defense. But again, we have a situation, we have a universe with two stories. If the defendant was 100 percent truthful with you, then he has complete self-defense. If he has lied to you and, Elvia has told you the truth, then it's not possible that he had these actual beliefs because no one can harbor these actual beliefs in the scenario you saw of on your knees, hands up, 'No. No. No. I give up. Stop.' "

In his closing, defense counsel focused entirely on self-defense. Counsel argued, "[Defendant's] not provoking Mr. Davis. He's telling him please get off the property, please go. And he can do that. It's his property. He's not out there telling Mr. Davis he's going to harm him, he's going to do anything. Just leave. Stay out of my yard. Get out of here. And he didn't shoot Mr. Davis as Mr. Davis is walking towards him. [¶] He didn't shoot at Mr. Davis at any point until that bike went down, the comments about the gun were made, and my client believes he was facing an ex-Marine with military training who had a firearm. [¶] . . . [¶] He fired two shots. He didn't fire the third shot immediately. No, he waited to see, and when Mr. Davis tried to get back up, he felt Mr. Davis was still a threat and he fired a final shot. . . . He stopped when he believed the threat was over." Counsel continued, "Was it reasonable for Mr. Ryan on November 21st, 2016, after experiencing what he had experienced that morning in his interactions with Mr. Davis at the point after the bike is thrown down, after there's an exchange about both people being armed, for him to believe that Mr. Davis was armed and that he had to shoot him because he, Mr. Ryan, would otherwise suffer great bodily injury or possibly death if Mr. Davis pulled a gun out[?] [¶] If you find that you don't believe this was reasonable, I submit to you then it's a case of imperfect self-defense, and you will have the jury instruction regarding voluntary manslaughter."

On appeal, defendant contends that CALCRIM Nos. 3471 and 3472 had no application to the facts of the case and, thus, should not have been given. He argues that his "verbal conduct did not deprive him of his right to self-defense if Davis responded in

an aggressive manner and [he] actually and reasonably believed he needed to defend himself against an imminent attack. By exposing jurors to legal principles which incorrectly enabled them to deny [him] the right to self-defense if they decided he started a fight simply by speaking with Davis and telling him to leave the property, the errors eviscerated the heart of his perfect self-defense claim and deprived him of his constitutional rights to a fair jury trial and due process."

"A party is entitled to a requested instruction if it is supported by substantial evidence. [Citation.] Evidence is '[s]ubstantial' for this purpose if it is 'sufficient to "deserve consideration by the jury," that is, evidence that a reasonable jury could find persuasive.' [Citation.] At the same time, instructions not supported by substantial evidence should not be given. [Citation.] 'It is error to give an instruction which, while correctly stating a principle of law, has no application to the facts of the case.' " (*People v. Ross* (2007) 155 Cal.App.4th 1033, 1049-1050.) We independently review whether the court erred by instructing the jury with CALCRIM Nos. 3471 and 3472. (*People v. Simon* (2016) 1 Cal.5th 98, 131, 133.)

Here ,the witness's testimony provided evidence that defendant initiated the verbal disagreement and escalated the verbal disagreement to a physical fight by firing at Davis, and failed to disengage before firing the fatal shot. Moreover, even if the evidence was insufficient to support the instruction, which we do not hold, any possible error would have been harmless. "[G]iving an irrelevant or inapplicable instruction is generally ' "only a technical error which does not constitute ground for reversal." ' " (*People v. Cross* (2008) 45 Cal.4th 58, 67.) In cases where a jury instruction is factually unsupported, "affirmance is the norm." (*People v. Guiton* (1993) 4 Cal.4th 1116, 1129.) "If the inadequacy of proof is purely factual, of a kind the jury is fully equipped to detect, reversal is not required whenever a valid ground for the verdict remains, absent an affirmative indication in the record that the verdict actually did rest on the inadequate ground." (*Ibid*.) In determining whether there was prejudice from the unsupported instruction, the entire record should be examined. (*Id*. at p. 1130.)

The jury was instructed on two legal theories supporting voluntary manslaughter: imperfect self-defense and heat of passion. Although the prosecutor briefly discussed heat of passion in closing argument, defendant never asserted that he was acting in the heat of passion and he relied solely on his claim of self-defense. We must therefore presume the jury found defendant guilty of voluntary manslaughter based on imperfect self-defense. To do so, the jury necessarily found that defendant did not start the fight so that, even if the jury misunderstood the scope of CALCRIM Nos. 3471 and 3472, the misunderstanding was harmless.[5]

Accordingly, we find no prejudicial error and affirm defendant's conviction.

2. Sentencing Issues

A. *The court did not abuse its discretion in imposing the aggravated term on the manslaughter conviction.*

Under section 1170, subdivision (b), "[w]hen a judgment of imprisonment is to be imposed and the statute specifies three possible terms, the choice of the appropriate term shall rest within the sound discretion of the court." The court's sentencing decision is reviewed for abuse of discretion. (*People v. Sandoval* (2007) 41 Cal.4th 825, 847.) "The trial court's sentencing discretion must be exercised in a manner that is not arbitrary and capricious, that is consistent with the letter and spirit of the law, and that is based upon an 'individualized consideration of the offense, the offender, and the public interest.' " (*Ibid.*) Thus, a trial court will abuse its discretion if it relies upon circumstances that are

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[5] Defendant suggests that the jury might not have deemed the limitations imposed on the right to self-defense by CALCRIM Nos. 3471 and 3472 applicable to imperfect self-defense but neither counsel suggested in argument that these instructions applied only to complete self-defense and the instructions do not so state. To the contrary, the jury was instructed that the "difference between complete self-defense and imperfect self-defense depends on whether the defendant's belief in the need to use deadly force was reasonable."

Defendant also argues CACRIM No. 3472 misstates the law by placing an improper restriction on the right to respond to the use of deadly force by someone who has provoked an altercation by use of non-deadly force. Since the jury rejected the factual premise that defendant provoked the fight, any misstatement of the law also was not prejudicial.

not relevant to the sentencing decision or that otherwise constitute an improper basis for decision. (*Ibid.*; see, e.g., Cal. Rules of Court, rule 4.420(c) [fact underlying an enhancement may not be used to impose the upper term unless the court strikes the enhancement]; *id.*, rule 4.420(d) [fact that is an element of the crime may not be used to impose the upper term].)

In sentencing defendant, the court recognized that there were some factors in mitigation: "His record to me is a mitigating factor. . . . He doesn't have any recent record. His health conditions, to some extent, to me are a mitigating factor, although they don't really bear into the actual facts of the case or the events of what happened. So, it's something to consider. He has military experience. There's a criteria that I'm supposed to consider when a person is a veteran. And he is a veteran." The court also acknowledged defendant had "a lot of good things in his background. He's worked as a minister. He has helped out with various things. I read all the letters in support of him. I read the letter from his daughter." Finally, the court disagreed with the prosecutor and found there was no evidence of racial animus, so the victim's race would not be a sentencing factor.

Nonetheless, the court selected the upper terms for both the offense and the enhancement, resulting in a sentence of 21 years in prison. The court explained, "[H]e armed himself. There was no reason to do so unless he intended to use force. He didn't need to go outside to confront [Davis] or anyone who was out there. He had every availability, if he thought there was a problem, calling the police. Inside his house he had a video feed where he could watch what was going on outside. He didn't have to engage [Davis] in an argument. To the extent he did and it became an argument it is something that the defendant basically precipitated and he precipitated that knowing he was armed and knowing he could end it in the way he did. And to me that's callus, that's cruel, that's aggravating. [¶] And, again, there's so many other ways, even if you had a firearm, that he could have used it to avoid this confrontation. [¶] I think the vulnerability of the victim in this case is basically, largely a factor of the victim not having any way of knowing that Mr. Ryan was intending to shoot him if he kept coming towards him. [¶] I'm trying to, basically, categorize in my mind why the aggravated term is appropriate because I

believe it is because the aggravating factors far outweigh any mitigating factors in terms of the voluntary manslaughter charge. [¶] As I said when I went on my speech there, it's aggravated. I'm trying to avoid using the same factors twice. And I think, basically, when you shoot three times, part of the time when the person is down, the use of the firearm enhancement is — I'm using that for the firearm enhancement. [¶] The rest of it, you know, arming himself, precipitating in a quarrel, knowing he could kill if he had to. Shooting to kill as he said he did when he testified. The factors in aggravation clearly outweigh any factors in mitigation."

Defendant contends the court abused its discretion by imposing the aggravated term on defendant's manslaughter conviction because many of the aggravating factors relied on by the court "were inherent in the crime or did not warrant an aggravated sentence when weighed against the mitigating factors." Specifically, he suggests "the trial court abused its discretion when it relied on the fact that [defendant] was 'armed' when he went to the front of his house and that [defendant] shot to kill" because the firearm allegation punished defendant for being armed and shooting the firearm and because an intent to kill is an element of voluntary manslaughter. The trial court, however, did not rely solely on the facts that defendant was armed and shot to kill. The court relied on the entirety of defendant's conduct in arming himself, precipitating a quarrel, knowing he could kill if he had to. As the court explained, this entire incident was avoidable. Defendant unnecessarily set in motion a series of events that led to Davis's death. For that reason, he is more culpable than others who commit manslaughter based on a unreasonable belief in the need for self-defense.[6]

[6] Given the strength of this factor in aggravation, we need not consider whether the record also supports the court's finding that Davis was "particularly vulnerable." (*People v. Black* (2007) 41 Cal.4th 799, 813 [A single factor in aggravation is sufficient support for imposition of the upper term.]; *People v. Jones* (2009) 178 Cal.App.4th 853, 861 [If a trial court has stated both proper and improper reasons for its sentencing choice, a reviewing court will "set aside the sentence only if it is reasonably probable that the trial court would have chosen a lesser sentence had it known that some of its reasons were improper."].)

The court did not abuse its discretion in finding that this aggravating factor outweighed the mitigating factors. The record shows that the court considered defendant's age and health, his military record, his minimal prior criminal record and his prior success on probation. The court also acknowledged that the jury had credited his imperfect self-defense claim.[7] Nonetheless, defendant argues that the court failed to consider in mitigation that "the crime was committed because of an unusual circumstances unlikely to reoccur (Cal. Rules of Court, Rule 4.423, subd. (a)(3)), [defendant] participated in the crime solely cause he actually believed that he had the right to shoot Davis as the jury found (Cal. Rules of Court, Rule 4.423, subd. (a)(4), (7)), and [defendant] was motivated to shoot solely to protect his own life (Cal. Rules of Court, Rule 4.423, subd. (a)(8))." While the court may not have identified those factors by citation to the Rules, the court clearly acknowledged the underlying facts and reasonably concluded that despite those facts, the aggravated term was warranted because the killing was entirely senseless and unnecessary.

B. *The court did not abuse its discretion in imposing the aggravated term on the firearm enhancement.*

Initially, defendant contends the court "abused its discretion by refusing to strike the firearm allegation under Senate Bill 620." Senate Bill No. 620, which took effect on January 1, 2018, modified section 12022.5, subdivision (c) to authorize a court to "in the interest of justice pursuant to Section 1385 and at the time of sentencing, strike or dismiss an enhancement otherwise required to be imposed by this section." (See also *People v. McDaniels* (2018) 22 Cal.App.5th 420, 423 [Senate Bill amended the Penal Code to allow striking of previously mandatory firearm enhancements]; *People v. Jones* (2007) 157 Cal.App.4th 1373, 1379-1380 [" '[A] court has discretion under section 1385,

[7] The court explained that is was "somewhat mitigating" that the jury based its voluntary manslaughter conviction on imperfect self-defense and that it was "giving him some benefit for that." Nonetheless, the court explained, "at the end of the day by the time you get to the second and the third shot, he's basically executing him. . . . And as I put this on the continuum of cases where voluntary manslaughter could be the result, this is about as senseless, unnecessary and, for want of a better term, aggravated, a form of voluntary manslaughter that I can picture."

subdivision (c), to dismiss or strike an enhancement, or to "strike the additional punishment for that enhancement in the furtherance of justice." ' "].) Defendant contends the interests of justice support striking the enhancement in this case because "the killing of Davis was the result of a unique set of circumstances unlikely to ever reoccur" and "was an isolated act of violence." In addition, defendant suggests that given defendant's age and physical health, imposing the additional enhancement in this case means that he "will serve the rest of his life in prison." Defendant did not make a formal motion asking the court to consider striking the enhancement. Rather, he asked that the court select the mitigated term of three years or consider running the enhancement "concurrent as the new law allows." Assuming without deciding that defendant's request was sufficient to preserve the issue on appeal (see *People v. Lee* (2008) 161 Cal.App.4th 124, 129 [failure to invite the trial court to dismiss the enhancement under section 1385 forfeits that claim on appeal]), the court did not abuse its discretion by refusing to strike the enhancement or by imposing the aggravated term.

Generally, in ruling whether to strike a sentence enhancement, on its own motion, "in furtherance of justice" pursuant to section 1385, subdivision (a), the trial court must look for "justice" within the bounds of the sentencing "scheme to which the defendant is subject . . . informed by generally applicable sentencing principles relating to matters such as the defendant's background, character, and prospects." (*People v. Williams* (1998) 17 Cal.4th 148, 160.) The purpose of the firearm enhancements is to impose "substantially longer prison sentences . . . on felons who use firearms in the commission of their crimes, in order to protect our citizens and to deter violent crime." (*People v. Brookfield* (2009) 47 Cal.4th 583, 595, citing Legis. finding, Stats. 1997, ch. 503, § 1 [uncodified provision].) As noted above, in selecting an appropriate sentence the court's "discretion must be exercised in a manner that is not arbitrary and capricious, that is consistent with the letter and spirit of the law, and that is based upon an 'individualized consideration of the offense, the offender, and the public interest.' " (*People v. Sandoval, supra,* 41 Cal.4th at p. 847.)

Here, the court explained that it selected the aggravated term on the firearm enhancement based on defendant's firing of the gun three times, including when the victim was already down on the ground. Defendant contends that "firing the gun three times or two times or while Davis was on the ground [does] not make the offense distinctively worse than other voluntary manslaughters committed with a firearm" and that "the mitigating factors, significantly outweighed the one aggravating factor relied on by the court and the court ignored the majority of the mitigating factors."

We disagree.

Contrary to defendant's argument, continuing to fire the gun when the victim was already on the ground, does make the use of the firearm particularly egregious. In those seconds when Davis was falling to his knees, defendant had time to reevaluate the situation and possibly avoid killing Davis. Even if defendant honestly believed he was still in danger when he fired the final shot, the jury found that his use of force was unreasonable. As the court observed with respect to how a gun might have been used, there is a "difference between pointing a gun in the air or even discharging it into the ground or discharging it in the air or even pointing it at someone . . . and firing three times at somebody at a relatively close range, including after you know they're down is, you know, like a world apart from a brandishing type situation where you use a firearm in a threatening way." As discussed above, the court did not ignore any factors in mitigation. It acknowledged the facts that might support a mitigated term but concluded that the factors in aggravation outweighed the mitigating facts. Accordingly, the court did not abuse its discretion in refusing to strike the enhancement or by finding that defendant's use of the firearm was sufficiently egregious to warrant imposition of the aggravated term.

C. *Defendant is not eligible for mental health diversion under section 1001.36.*

The killing in this case occurred in November 2016. Defendant was tried and convicted in May 2018 and sentenced on June 29, 2018. Effective June 27, 2018, the Legislature created a pretrial diversion program for defendants who suffer from a mental disorder if their mental disorder was a significant factor in the commission of the charged

offense. (§ 1001.36, subd. (b), added by Stats. 2018, ch. 34, § 24.) On September 30, 2018, about three months after section 1001.36 became effective, the Legislature amended section 1001.36 to exclude defendants who have been charged with murder or voluntary manslaughter, among other things. (§ 1001.36, subd. (b)(2), added by Stats. 2018, ch. 1005, § 1.) The amendment became effective approximately three months later, on January 1, 2019. (See Cal. Const., art. IV, § 8, subd. (c), par. (1); Gov. Code, § 9600, subd. (a).)

Defendant contends that he is entitled to a remand so the trial court can consider granting him pretrial mental health diversion under section 1001.36, as it read at the time of his sentencing. He acknowledges that the 2019 amendment, if applicable, would bar him from participating in pretrial diversion, but argues that applying the 2019 amendment retroactively would violate the ex post facto clauses of the California and federal Constitutions. (U.S. Const., art. 1, § 9, cl. 3, § 10, cl. 1; Cal. Const., art. I, § 9.)

The Courts of Appeal are currently divided on whether section 1001.36 applies retroactively to persons, like defendant, who were tried and convicted before section 1001.36 went into effect. The issue is currently pending before our Supreme Court. (Compare *People v. Frahs* (2018) 27 Cal.App.5th 784, 790, review granted Dec. 27, 2018, S252220 [§ 1001.36 applies retroactively] with *People v. Craine* (2019) 35 Cal.App.5th 744, 757, review granted Sept. 11, 2019, S256671 [§ 1001.36 applies only prospectively].) In addition, review by the Supreme Court has also been granted in two cases in which the appellate courts held that retroactive application of the 2019 amendment does not violate the ex post facto clauses of the California and federal Constitutions. (*People v. McShane* (2019) 36 Cal.App.5th 245, 259, review granted Sept. 18, 2019, S257018; *People v. Cawkwell* (2019) 34 Cal.App.5th 1048, 1053, review granted Aug. 14, 2019, S256113.)

For purposes of this appeal, we assume without deciding that section 1001.36 applies retroactively to judgments not yet final as of its effective date in 2018.

Nonetheless, defendant is statutorily ineligible for mental health diversion under the 2019 amendment. (*People v. McShane, supra,* 36 Cal.App.5th at p. 259, review granted Sept. 18, 2019, S257018; *People v. Cawkwell, supra*, 34 Cal.App.5th at p. 1053, review granted Aug. 14, 2019, S256113.) Like defendant here, the defendant in *People v. Cawkwell, supra*, 34 Cal.App.5th at page 1053, argued that "the ameliorative provisions of the mental health diversion statutes apply retroactively to his case, while the subsequent amendment eliminating eligibility for sex offenders (like him) cannot apply retroactively due to ex post facto considerations." The court rejected the contention that retroactive application of the 2019 amendment violated the ex post facto clauses. (*Ibid*.) The court explained that a statute violates the prohibition against ex post facto laws " 'if it punishes as a crime an act that was innocent when done or increases the punishment for a crime after it is committed.' " (*Id*. at p. 1054.) "The ex post facto prohibition ensures that people are given 'fair warning' of the punishment to which they may be subjected if they violate the law; they can rely on the meaning of the statute until it is explicitly changed." (*Ibid*.) The court reasoned that when the defendant committed his crimes "between November 2015 and April 2016, the possibility of pretrial mental health diversion did not exist. The initial version of section 1001.36 was not enacted until more than two years later, in June 2018. Consequently, [the defendant] could not have relied on the possibility of receiving pretrial mental health diversion when he [committed his crimes]." (*Ibid*.) The court also held the January 1, 2019 amendment "did not make an act unlawful that was not formerly unlawful, nor did it increase the punishment for the offenses with which [the defendant] was charged." (*Id*. at p. 1054.) "That is, [the defendant] was subject to the same punishment when he committed his offenses as he was after the Legislature narrowed the scope of defendants eligible for diversion. Thus, the amendment does not violate the ex post facto clauses of the state or federal Constitutions, and [defendant] is ineligible for mental health diversion." (*Ibid.*; see also *People v. McShane, supra*, 36 Cal.App.5th at p. 260 [finding no ex post facto violation

because "the enactment of the murder exclusion did not change the consequences of his crime *as of the time he committed it*"].)

Similarly, here, defendant committed his crimes over a year before the Legislature enacted section 1001.36. Because all relevant legislative activity occurred after defendant committed his offenses, he could not have relied on the possibility of receiving mental health diversion when he committed his crimes and the retroactive application of the 2019 amendment does not change the consequences of his crime as of the time he committed it. Accordingly, defendant is statutorily ineligible for mental health diversion because of the crime with which he was charged.

Disposition

The judgment is affirmed.

POLLAK, P. J.

WE CONCUR:

STREETER, J.
BROWN, J.